U.S. Department of Labor Office of Administrative Law Judges
Washington, DC

In the Matter of :

SNAKE RIVER FARMERS Assoc., Inc., Case No. 86-TLC-2
53 Employers

Before: RENO E. BONFANTI
Administrative Law Judge

DECISION AND ORDER

This is an administrative-judicial review of a denial of employers' applications for labor certification for temporary employment of 309 aliens in the United States arising under the Immigration and Nationality Act (Act).[1]

Under Section 212(a)(14) of the Act an alien seeking to enter the United States to perform temporary agricultural work is ineligible to receive q visa unless the Secretary of Labor has certified to the Attorney General that there are insufficient United States workers who are able, willing, qualified, and available, and, the employment of the alien will not adversely affect the wages and working conditions of United States workers.

Regulations promulgated by the Secretary of Labor relating to the processing of temporary labor certification applications are set forth at 20 C.F.R. §655 et seq. An employer who intends to employ an alien temporarily must submit, as part of his application, documentation which clearly meets the requirements §655.202 and §655.203. Full compliance with those requirements is the minimum necessary to show that an employer has made a good faith effort to test the availability of, and recruit qualified U.S. workers.

Pursuant to 20 C.F.R. §655.212, the above employers sought administrative-judicial review of the Regional Administrator's denial of temporary labor certification issued on January 3, 1986. The appeal with accompanying brief was timely filed with the Office of Administrative Law Judges and, on January 13, 1986, assigned to the undersigned judge. Over objections, a Motion of Intervene was granted Migrant Legal Action Program, Inc. for Pedro Pena, a U.S. farm worker from Laredo Texas, who is interested in the jobs in Idaho. Intervenor's brief was filed on January 16, 1986. The Department of Labor Office of the Solicitor filed a brief on January 14, 1986. A reply brief was filed for the Employers on January 16, 1986. Intervenor filed a reply brief on January 17, 1986. Employers filed another reply brief on January 17, 1986.

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[1] 8 U.S.C. §1101 et seq.

Statements[2] were received from other interested parties. To the extend that arguments raised in the briefs concern matters other than the narrow issue before me, they are rejected.

Statement of the Case

On December 23, 1985, 53 members of the Snake River Farmers Association ("SRFA") filed applications for temporary labor certification on behalf of 309 non-immigrant aliens to perform farm irrigation work in Idaho, to begin on March 15, 1986 (AF 20-22). The applications state that the "Employers agree to pay the adverse wage rate determined pursuant to 20 CFR 655.207(a) which is the prevailing wage rate in the area of intended employment." On January 3, 1986 the Regional Administrator (",A") denied certification on the grounds that the employers failed to assure that they "will pay workers the adverse wage rate" as required by 20 CFR §655.202(b)(ii).[3] The R.A. ruled that the employers' promise to pay "the prevailing wage rate" is insufficient, inasmuch as after the commencement of work under these contracts, it may be determined that the use of aliens has depressed the wages of similarly employed U.S. workers in Idaho, thus necessitating the enactment of a higher "adverse effect wage rate" (AEWR) for the state. If this is determined, the RA ruled that any applicable new wage rates must be paid by these employers, prospectively, once the new rate becomes effective.

Employers contend that their promise to pay "the prevailing wage rates" is in strict compliance with §655.207(a) and 655.202 (b)(9)(i), and that the denial of certification was arbitrary, capricious and not in accordance with law. Employers specifically object to any prospective application of new wage rates which may be formulated after these labor contracts have been entered into. Employers emphasize the hardship which would be imposed upon them if they are forced to make planting and hiring decisions without the benefits of knowing what their labor costs will be, and cite provisions from other labor statutes which exempt from application any increases in Department of Labor wage determinations which become effective after a contract is awarded. 29 CFR §1.6 (1985), 20 CFR §4.161 (1985).

Discussion

The R.A.'s determination that any recalculation of the proper AEWR in Idaho for farm labor would become applicable to these contracts once the new rate becomes effective was the basis for his denial of certification. Accordingly, it must be determined whether this interpretation is arbitrary, capricious, or not in accordance with law.

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[2] Letters were received in behalf of migrant U.S. farmworkers from the Idaho Legal Aid Services, Inc., Oregon Legal Services Corporations and Texas Rural Legal Aid, Inc., all supportive of the DOL denial. Essentially, they raise matters which are not before me and accordingly must be rejected.

[3] The regulations do not contain a §655.202(b)(ii). Since The workers at issue will be paid on an hourly basis, it is presumed that the R.A. was referring to §655.202(b) (9)(i).

When workers are to be paid on an hourly basis, the employer must assure that they will be paid at least the AEWR. §655.202(b)(9)(i). Except as otherwise provided, the AEWR for all agricultural employment shall be the prevailing wage rates in the area of intended employment. §655.207(a). §655,207(b)(2) lists fourteen states where it has been determined that the use of foreign labor has depressed the wages of U.S. workers, and for which annual calculations of the AEWR are made. While Idaho is not among those states listed, this regulation provides that "other states may be added as appropriate."[4]

Contrary to the employers assertion, §655.207(a) is not the only regulation pertinent to this case. Rather, all the regulations set forth at 20 C.F.R. 655 et seq. are relevant. While an employer in a state not listed in § 655.207(b)(2) arguably complies with §655.207(a) by promising to pay the local prevailing wage rate, he remains on notice that §655.207(b)(2) authorizes the Department of Labor to periodically add states whenever it has been found that the use of foreign labor has adversely effected the wages of U.S. workers. While other labor regulations cited by employer specifically exempt from applicability any increases in wage rates which take effect after a contract has commenced, they are based upon considerations not applicable to the instant case. Further, no case law support for the employer's position has been shown. With due regard for the clear congressional mandate to protect the U.S. worker from a depression of wages occasioned by importing alien workers, I do not read 20 CFR 655 et seq. as foreclosing the possibility that increased wage rates may take effect at any time during the labor season. Moreover, prior to the certification of labor applications for foreign workers, the Department of Labor must certify to the INS that the H-2 workers employed "will not" adversely affect the wages and working conditions of domestic workers. 8 C.F.R. §214.2(h)(3)(i). In order to do so the Department of Labor must obtain from employers' seeking alien workers certain assurances designed to protect wages and future employment of domestic workers against such competition, even though some economic hardship falls on the employer. VAGA v. U.S. Dept. of Labor 756 F.2d 1025 (4th Cir. 1985). Thus, as a matter of statutory construction, the R.A.'s position in this case that any future promulgation of an AEWR for Idaho would take effect when implemented is consistent with the regulations and policy behind the Act.

Furthermore, the R.A. 's position is reasonable and consistent with other interpretations of the regulations governing temporary labor certifications. In VAGA v. Donovan No. 83-146 (W.D. Va) (4-26-85), the court ordered employers filing labor certification applications to agree to pay all workers the 1985 AEWR once that rate was conclusively determined. While the above case involved employers in Virginia which is a state specifically subject to annual calculations of the AEWR by the Department of Labor, and who were thus on notice that they must pay the determined rates once an accurate methodology was implemented, the members OF SRFA are also on notice that the Department of Labor may begin to promulgate an AEWR for Idaho

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[4] In October 1985, the Employment and Training Administration Issued a Notice of Proposed Rulemaking to add Montana to the list of states for which annual AEWRs are calculated. The Intervenor's counsel has noted that in a reply letter to him dated Dec. 20, 1985, the ETA noted that initiating rulemaking to establish AEWRs in Idaho and Oregon is under consideration.

whenever the use of foreign labor has depressed local wages. Additionally, the Fourth Circuit has approved of the Department of Labor "50% rule" which requires employers to give written assurance that they will hire available domestic workers until 50% of the foreign workers' contract has elapsed, notwithstanding the fact that domestic labor was not available at the time of certification and alien workers may have to be terminated. VAGA v. U.S. Department of Labor, supra.

Finally, the hardship imposed upon employers when forced to make further assurances which may alter their obligations in mid-season has not gone unnoticed. However, that argument must fall when weighed against the overriding policy of the Act to protect domestic workers. "To recognize a legal right to use alien workers upon a showing of business justification would be to negate the policy...that domestic workers rather than aliens be used whenever possible." Elton Orchards v. Brennan 508 F.2d 493, 500 (lst Cir. 1974). I do not see any inconsistency in application of the law or policy by the Department of Labor. The federal courts which have ruled on such issues uniformly give credence to the agency's expertise and resolve the equities in favor of the U.S. worker over that of the employer. Florida Sugar Cane League 531 F.2d 299 (5th Cir. 1976); VAGA v. Department of Labor, supra; VAGA v. Donovan, supra.

The Act gives employers the opportunity to use temporary foreign labor in limited circumstances. If the members of SRFA choose to avail themselves of this opportunity, then it is not unreasonable to require that they pay, prospectively, for the remaining employment season, wages which will not adversely affect the wages of U.S. workers.

After considering the regulations, relevant case law, and the policy behind the Act, I conclude that the R.A.'s decision was not arbitrary, capricious, or inconsistent with the law. The petitioners have failed to meet their burden.

ORDER

The Regional Administrator's denial of the temporary labor certification applications submitted by SRFA, Inc., is hereby affirmed.[5]

RENO E. BONFANTI
Administrative Law Judge

Dated: 22 January 1986
Washington, DC

REB/jb

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[5] Although the issue is not before me, it appears that if the members of SRFA agree to amend their applications to pay any new AEWR, if promulgated, there would be no need to file new applications, and the certification process could be expedited.